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Tenth report on reservations to treaties

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Addendum

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D. Determination of the validity of reservations and consequences thereof

147. It must be recognized that the notion of the object and purpose of a treaty, while less of an "enigma" than the writers would have it,[341] does not lend itself to neat theoretical definition and inevitably leaves room for the subjectivity of the interpreter,[342] who must, in each individual instance, make a specific assessment that takes into account, in particular, the elements referred to in draft guideline 3.1.6,[343] bearing in mind the nature (customary, non-derogable, peremptory) of the norm to which the reservation relates (even if an actual fact such a determination is not directly linked to determination of the object and purpose[344]).

148. The resulting disadvantages, should not, however, be exaggerated. After all, the draft guidelines, which offer guidance of a general nature by which an interpreter must allow himself to be directed in good faith, are no more vague than the guiding principles derived from the rules of interpretation set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which are, for that matter, very similar,[345] and have quite rightly been described as one of the crowning achievements of the Convention.[346] And while in practice it may not be a simple matter to apply these guidelines, they do not pose insurmountable problems and are clearly quite workable in practice.

149. Consequently, even though it is perfectly true that the Vienna Conventions do not establish any method for settling possible disputes over whether a reservation is compatible with the object and purpose of the treaty to which it relates,[347] it is unwarranted for the commentators to focus unduly on the issue of establishing who is competent to determine the compatibility (or incompatibility) of a reservation with the object and purpose of a treaty. Furthermore, as indicated above, the very same issue arises when it comes to assessing whether a reservation is compatible with a treaty clause prohibiting the formulation of reservations or restricting the possibility of formulating them.[348]

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[341] See above, paras. 72 and 84.

[342] See above, para. 72.

[343] See above, para. 91.

[344] See above, especially paras. 120-125, 134-136 and 140-143.

[345] See above, para. 86.

[346] P. Reuter, op. cit., note 28, p. 89

[347] See, for example, Jean Combacau, "Logique de la validité contre logique de l'opposabilité dans la Convention de Vienne sur le droit des traités", *Le droit international au service de la paix, de la justice et du développement — Mélanges Michel Virally* Paris, Pedone, Paris, 1991, pp. 197-198 and 201-202; or Karl Zemanek, "Some Unresolved Questions concerning Reservations in the Vienna Convention on the Law of Treaties", *Essays in International Law in Honour of Judge Manfred Lachs*, Nijhoff, The Hague 1984, p. 331.

[348] See above, paras. 52 and 53.

150. Keeping this in mind could help to calm down the heated debate over competence to assess the validity of reservations, and in reviewing that issue there will also be an opportunity to reconsider some of the Preliminary Conclusions adopted by the Commission in 1997.[349] On the other hand, since it has not been determined which institutions are empowered to assess the validity of reservations, the result is an intertwining of powers, actual or potential, which further complicates the possible response to the crucial question of the consequences of the incompatibility of a reservation with the object and purpose of the treaty or with the treaty provisions explicitly or implicitly prohibiting certain reservations or categories of reservations (b).

1. Competence to assess the validity of reservations

151. It goes without saying that any treaty can include a special provision establishing particular procedures for assessing the validity of a reservation either by a certain percentage of the States parties or by a body with competence to do so. One of the most well-known and discussed clauses[350] of this kind is article 20, paragraph 2, of the 1965 Convention on the Elimination of All Forms of Racial Discrimination:

> "2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties object to it"[351] (emphasis added).

152. This reservations clause no doubt draws its inspiration from the unsuccessful attempts made to include in the Vienna Convention itself a mechanism enabling a majority to assess the validity of reservations:[352]

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[349] See note 346 above.

[350] See, for example, Antonio Cassese, "A New Reservations Clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination", *Recueil d'études de droit international en hommage à Paul Guggenheim*, Institut Universitaire des Hautes Etudes Internationales (I.U.H.E.I.), Geneva, 1968, pp. 266-304; C. J. Redgwell, op. cit., note 162, pp. 13-14; or R. Riquelme Cortado, op. cit., note 27, pp. 317-322.

[351] Other examples are article 20 of the Convention concerning Customs Facilities for Touring of 4 June 1954, which authorizes reservations if they have been "accepted by a majority of the members of the Conference and recorded in the Final Act" (para. 1) or made after the signing of the Final Act without any objection having been expressed by one third of the Contracting States within 90 days from the date of circulation of the reservation of the Secretary-General (paras. 2 and 3); the similar clauses in article 14 of the Additional Protocol to this Convention and in article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles (see the *Handbook of Final Clauses prepared by the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat* (ST/LEG/6), 5 August 1957, pp. 103-107); or article 50, para. 3, of the 1961 Single Convention on Narcotic Drugs and article 32, para. 3, of the 1971 United Nations Convention on Psychotropic Substances, which make the admissibility of the reservation subject to the absence of objections by one third of the contracting States.

[352] For a summary of the discussions on the matter by the Commission and during the Vienna Conference, see R. Riquelme Cortado, op. cit., note 27, pp. 314-315.

- Two of the four proposals submitted as rules *de lege ferenda* in 1953 by Hersch Lauterpacht made the acceptance of a reservation conditional upon the consent of two thirds of the States concerned;[353]

- Fitzmaurice made no express proposal on this matter because he held to a strict interpretation of the principle of unanimity,[354] yet on several occasions he let it be known that he believed that a collective assessment of the admissibility of reservations was the "ideal" system;[355]

- Although Waldock had also not proposed such a mechanism in his first report in 1962,[356] several members of the Commission took up its defence;[357]

- During the Vienna Conference, an amendment to this effect proposed by Japan, the Philippines and the Republic of Korea[358] was rejected by a large

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[353] Variants A and B, in the first report on the law of treaties (A/CN.4/63), pp. 8-9 (English text in *Yearbook ... 1953*, vol. II, pp. 91-92). Variants C and D, respectively, assigned the task of assessing the admissibility of reservations to a commission set up by the States parties and to a Chamber of Summary Procedure of the International Court of Justice (ibid., pp. 9-10 and 92); see also the proposals submitted during the drafting of the Covenant of Human Rights reproduced in Hersch Lauterpacht's second report (A/CN.4/87), pp. 30-31 (English text in *Yearbook ... 1954*, vol. II, p. 132).

[354] First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, pp. 118 and 129-131.

[355] See especially Fitzmaurice, op. cit., note 122, pp. 23-26.

[356] First report (A/CN.4/144) *Yearbook ... 1962*, vol. II.

[357] See especially Briggs in *Yearbook ... 1962*, vol. I, 651st meeting, of 25 May 1952, para. 28, and the 652nd meeting, 28 May 1962, paras. 73-74; Gros, 654th meeting, 30 May 1962, para. 43; Bartoš, 654th meeting, para. 66; *contra*: Rosenne, 651st meeting, para. 83; Tounkine, 653rd meeting, 29 May 1962, paras. 24-25 and 654th meeting, para. 31; Jiménez de Aréchaga, 653rd meeting, para. 47; and Amado, 654th meeting, para. 34. Waldock proposed a variant reflecting these views (see 654th meeting, para. 16), and although they were rejected by the Commission, they appear in the commentary on draft article 18 (*Yearbook ... 1962*, vol. II, p. 179, para. 11) and in the 1966 commentaries to draft articles 16 and 17 (*Yearbook ... 1966*, vol. II, p. 205, para. 11). See also Waldock's fourth report (A/CN.4/177) *Yearbook ... 1965*, vol. II, p. 46, para. 3.

[358] The amendment to article 16, paragraph 2, stipulated that, if objections "have been raised ... by a majority of the contracting States as of the time of expiry of the 12-month period, the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect" (A/CONF.39/C.1/L.133/Rev.1 in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference, Committee of the Whole* (A/CONF.39/11/Add.2), para. 177 (i) (a)). The original amendment (A/CONF.39/C.1/L.133) had set a time limit of three months instead of twelve months. See also Japan's statement at the Conference, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11, Committee of the Whole, 21st meeting, 10 April 1968, para. 29, and 24th meeting, 16 April 1968, paras. 62-63); and another amendment along the same lines introduced by Australia (A/CONF.39/C.1/L.166 in A/CONF.39/11/Add.2, para. 179), which subsequently withdrew it (see ibid., para. 181). Without submitting a formal proposal, the United Kingdom indicated that "there was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty" (*Summary records* (A/CONF.39/11). Committee of the Whole, 21st meeting, para. 76).

majority [359] despite the support of several delegations;[360] the Expert Consultant, Sir Humphrey Waldock,[361] and some other delegations[362] were very doubtful about this kind of collective monitoring system.

153. One is, however, compelled to recognize that such clauses — however attractive they may seem intellectually,[363] — at all events fall short of resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them[364] and they leave important questions unanswered:

- Do such clauses make it impossible for States parties to avail themselves of the right to raise objections under article 20, paragraphs 4 and 5 of the Vienna Convention? Given the very broad latitude that States have in this regard, the answer must unquestionably be in the negative; indeed, States objecting to reservations formulated under article 20 of the Convention on the Elimination of All Forms of Discrimination have maintained their objections[365] even though their position did not receive the support of two thirds of the States parties, which is needed for an "objective" determination of incompatibility under article 20.

- On the other hand, the mechanism set up by article 20 dissuaded the Committee on the Elimination of Racial Discrimination established under the

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[359] By 48 votes to 14, with 25 abstentions (A/CONF.39/11/Add.2, note 358 above, para.182 (c)).

[360] Viet Nam (*Summary records* (A/CONF.39/11), note 358 above, Committee of the Whole, 21st meeting, 10 April 1968, para. 22), Italy (22nd meeting, 11 April 1968, para. 79), China (23rd meeting, 11 April 1968, para. 3), Singapore (23rd meeting, para. 16), New Zealand (24th meeting, 16 April 1968, para. 18), India (24th meeting, paras. 32 and 38), Zambia (24th meeting, para. 41), Ghana (22nd meeting, paras. 71 and 72). The Swedish representative, while supportive in principle of the idea of a monitoring mechanism, believed that the Japanese proposal was "no more than an attempt at solving the problem (22nd meeting, para. 32). See also the reservations expressed by the United States of America (24th meeting, para. 49) and by Switzerland (25th meeting, 16 April 1968, para. 9).

[361] With regard to the amendment proposed by Japan and other delegations (see note 358 above), the view of the Expert Consultant was that "proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations" (*Summary records* (A/CONF.39/11), note 358 above, 24th meeting, 16 April 1968, para. 9).

[362] Thailand (ibid., 21st meeting, 10 April 1968, para. 47), Argentina (24th meeting, 16 April 1968, para. 45), Czechoslovakia (24th meeting, para. 68), Ethiopia (25th meeting, 16 April 1968, para. 17).

[363] It is possible, though, to question the value of a collegiate system when the very purpose of a reservation is precisely "to cover the position of a State, which regarded as essential a point on which a two-thirds majority had not been obtained" (*Yearbook ... 1962*, vol. I, Jiménez de Aréchaga, 654th meeting, 30 May 1962, para. 37). See also the sharp criticisms by A. Cassese, op. cit., note 350, *passim* and, in particular, pp. 301-304.

[364] On the question of State inertia in this regard, see the comments of the Expert Consultant during the Vienna Conference, note 361 above, and P-H. Imbert, op. cit., note 22, pp. 146-147, or R. Riquelme Cortado, op. cit., note 27, pp. 316-321; see also paragraph 186 below.

[365] See *Multilateral treaties deposited with the Secretary-General: Status as at 31 December 2003* (United Nations publication, Sales No. E.04.V.2) (hereinafter *Multilateral Treaties ...*), note 217 above, vol. I, pp. 142-147.

Convention from taking a position on the validity of reservations,[366] which raises the issue of whether the Committee's attitude is the result of a discretionary judgement or whether, in the absence of specific assessment mechanisms, the monitoring bodies have to refrain from taking a position. Actually, 'ning obliges them to do so; once it is recognized that such mechanism ake precedence over the procedures provided for in the treaty for determining the validity of reservations, and that the human rights treaty bodies are called upon to rule on that point as part of their mandate,[367] they can do so in every instance, just as States can.

154. In reality, the controversy raging on this issue among the commentators can be ascribed to the conjunction of several factors:

- The issue really arises only in connection with the human rights treaties;
- This is the case because, to begin with, it is in this area and only this area that modern treaties almost invariably create mechanisms to monitor the implementation of the norms that they enact; however, while it has never been contested that a judge or an arbitrator is competent to assess the validity of a reservation, including its compatibility with the object and purpose of the treaty to which it refers,[368] the human rights treaties endow the bodies which they establish with distinct powers (some — at the regional level — can issue binding decisions but others, including the Human Rights Committee, can address to States only general recommendations or recommendations related to an individual complaint);
- This is a relatively new phenomenon which was not taken into account by the drafters of the Vienna Convention;
- Furthermore, the human rights treaty bodies have held to a particularly broad concept of their powers in his field: not only have they recognized their own competence to assess the compatibility of a reservation with the object and purpose of the treaty that established them, but they have also seemed to consider that they had a decision-making power to that end, even when they are not otherwise so empowered[369] and, applying the "divisibility" theory, they have declared that the States making the reservations they have judged to

[366] "The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision — even a unanimous decision — by the Committee that a reservation is unacceptable could not have any legal effect" (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 18* (A/33/18), para. 374). On this subject, see the comments of P-H. Imbert, op. cit., note 63 above, pp. 125-126, in *Human Rights Review*, 1981, pp. 41-42; and Dinah Shelton, "State Practice on Reservations to Human Rights Treaties", *Canadian Human Rights Yearbook*, 1983, pp. 229-230. Recently, however, the Committee on the Elimination of Racial Discrimination has taken a somewhat more flexible position: for instance, in 2003, it stated with reference to a reservation made by Saudi Arabia that "the broad and imprecise nature of the State party's general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it" (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18* (A/58/18), para. 209).

[367] See below, para. 157.

[368] See below, note 380.

[369] See, in this connection, the comments of A. Aust, op. cit., note 27, pp. 122-123.

be invalid are bound by the treaty, including by the provision or provisions of the treaty to which the reservations applied;[370]

- In so doing, they have aroused the opposition of States, which have no interest in being bound by a treaty beyond the limits which they accept, which they expect to be able to interpret as freely as possible; some States have reacted particularly violently and gone so far as to deny that the bodies in question have any jurisdiction in the matter;[371]

- This is compounded by the hypersensitivity of human rights activists and human-rights doctrine in this area, which has done nothing to calm a contentious debate that is nevertheless largely artificial.

155. In reality, the issue is unquestionably less complicated than is generally presented by commentators — which does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to rule on the validity of a reservation, when the issue comes before them in the exercise of their functions, including of course the compatibility of the reservation with the object and purpose of the treaty.[372] Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction vis-à-vis the States concerned, whether in their consideration of claims by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the validity of reservations made by the States parties to the treaties establishing them.[373] Secondly, in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits.[374]

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[370] See general comment No. 24, note 227 above, para. 18; communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, note 229 above, para. 6.7. This decision led the State party in question to denounce the Optional Protocol (see *Multilateral Treaties* ..., vol. I, chap. IV.5, p. 227, note 3), which did not prevent the Committee from declaring, in a subsequent decision of 26 March 2002, that it considered that Trinidad and Tobago had violated several provisions of the 1966 Covenant, including the provision to which the reservation related (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 40* (A/57/40), vol. II, annex IX.T).

[371] See especially the very sharp criticisms expressed by the United States of America (note 290 above, p. 127), by the United Kingdom (note 287 above, p. 132) and by France (note 290 above, p. 102).

[372] See paragraph 5 of the Commission's 1997 Preliminary Conclusions on reservations to normative multilateral treaties including human rights treaties: "... where those treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them" (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 157).

[373] For an exhaustive presentation of the position of the human rights treaty bodies, see A/CN.4/477/Add.1, paras. 193-210; D. W. Greig, op. cit., note 29, pp. 90-107; see also R. Riquelme Cortado, op. cit., note 27, pp. 345-353 and, with particular reference to the bodies established by European Convention on Human Rights, see I. Cameron and F. Horn, op. cit., note 270, pp. 88-92.

[374] See paragraph 8 of the Commission's Preliminary Conclusions: "The Commission notes that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role" (note 372 above).

Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the validity of a contested reservation, they may not substitute their own judgement for the State's consent to be bound by the treaty.[375]

156. It goes without saying that the powers of the treaty bodies do not affect the power of States to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Convention.[376] Similarly, nothing prevents national courts, when necessary from assessing the validity of reservations made by a State on the occasion of a dispute brought before them,[377] including their compatibility with the object and purpose of a treaty, since they are authorized to apply the rules of international treaty law — in the case of States parties to the 1969 Vienna Convention — or of international customary law, because the principle set out in article 19, paragraph (c) has the value of customary law.[378]

157. It follows that this competence to assess the validity of a reservation can also belong to international jurisdictions or arbitrators. This would clearly be the case if a treaty expressly provided for the intervention of a jurisdictional body to settle a dispute regarding the validity of reservations, but no reservation clause of this type seems to exist, even though the question easily lends itself to a jurisdictional determination.[379] Nevertheless, there is no doubt that such a dispute can be settled by any organ designated by the parties to rule on differences in interpretation or application of the treaty. It should therefore be understood that any general clause on settlement of disputes establishes the competence of the body designated by the parties in that respect. What is more, that was the position of the International Court of Justice in its advisory opinion of 1951 on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide:

> "It may be (...) that certain parties, who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by

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[375] The Commission has stated in that connection, in paragraphs 6 and 10 of its Preliminary Conclusions, that the competence of the monitoring bodies to assess the validity of reservations "does not exclude or otherwise affect the traditional modalities of control by the contracting parties ..." and "that, in the event of inadmissibility of the reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty" (ibid.).

[376] See, however, Human Rights Committee general comment No. 24 (CCPR/C/21/Rev.1/Add.6), para. 18: "... It is an inappropriate task [the determination of the compatibility of a reservation with the object and purpose of the treaty] for States parties in relation to human rights treaties ...". This passage contradicts the preceding paragraph in which the Committee recognizes that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".

[377] See the decision of the Swiss Federal Tribunal of 17 December 1991 in the case of *Elisabeth B. v. The State Council of the canton of Thurgovie* (*Journal des Tribunaux*, I. *Droit fédéral*, 1995, pp. 523-537), and the commentary by Jean-François Flauss, "Le contentieux des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, paragraphe 1", *Revue Universelle des Droits de l'Homme*, 1993, pp. 297-303.

[378] See above, para. 56.

[379] In this respect, see Henry J. Bourguignon, "The Belios Case: New Light on Reservations to Multilateral Treaties", Virginia Journal of International Law 1989, p.359 or D. Bowett, op. cit. note 88, p. 81.

special agreement or by the procedure laid down in Article IX of the Convention."[380]

158. It must therefore be concluded that the competence to assess the validity of a reservation belongs, more generally, to the various entities that are called on to apply and interpret treaties: States, their domestic courts and, within the limits of their competence, bodies for the settlement of disputes and monitoring of the application of the treaty.

159. On the other hand, in accordance with the widely dominant principle of the "letter box depositary"[381] endorsed by article 77 of the Vienna Convention of 1969,[382] in principle the depositary can only take note of reservations of which it has been notified and transmit them to the contracting States[383] without ruling on their validity.

160. In adopting draft guideline 2.1.8, however, the Commission took the view that, from the perspective of the progressive development of international law, in case of reservations that were in the depositary's opinion manifestly [impermissible],[384] the depositary should draw "the attention of the author of the reservation to what, in the depositary's view, constituted such [impermissibility]".[385] It is worth noting that at that time, "the Commission considered that it was not justified to make a distinction between the different types of "impermissibility" listed in article 19" of the 1969 and 1986 Vienna Conventions.[386]

161. The present situation regarding verification of the validity of reservations to treaties, more particularly human rights treaties, is therefore one in which there is

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[380] *I.C.J. Reports* 1951, p. 27. Likewise, in its decision of 30 June 1977, the arbitral tribunal constituted for the *Mer d'Iroise* case was implicitly recognized as competent to rule on the validity of the French reservations "on the basis that the three reservations to article 6 [of the Convention on the Continental Shelf of 1958] are true reservations and admissible" (Reports of the International Arbitral Awards, vol. XVIII, p. 40, para. 56). See also the position of the International Court of Justice concerning the validity of "reservations" (of a specific nature, it is true, and different from those covered in the Guide to Practice — c.f. draft guideline 1.4.6 (Unilateral statements made under an optional clause") and its commentary ((A/55/10) note 51 above, chap. VII, sect. C.2) included in optional declarations of acceptance of its obligatory jurisdiction (see in particular the judgement of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections), I.C.J. Reports* 1957, pp. 141-144, the opinions of Sir Hersch Lauterpacht, individual in the Case of *Certain Norwegian Loans* (Judgement of 6 July 1957, *I.C.J. Reports* 1957, pp. 43-45) and dissenting in the case of *Interhandel* (judgement of 21 November 1959, *I.C.J. Reports* 1959, pp. 103-106 — see also the dissenting opinions of President Klaedstad and Judge Armand-Hugon, ibid., pp. 75 and 93). See also the jurisprudence cited in para. 96 above.

[381] See A/CN.4/518/Add.2, paras. 158-160 and 165; see also J. Combacau, "*Logique de la validite...*" note 347 above, p. 199.

[382] Which corresponds to article 78 of the 1986 Convention.

[383] See A/CN.4/518/Add.2, paras. 160-167 and draft guideline 2.1.7 (Functions of depositaries) of the Guide to Practice and its commentary (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), chap.IV, sect. C.2.)

[384] On the significance of the brackets, see para. 6 above.

[385] "Procedure in case of manifestly [impermissible] reservations", A/57/10, note 303 above. See also para. 183 below.

[386] Commentary on draft guideline 2.1.8, ibid., para. 5.

concurrence, or at least coexistence of several mechanisms for determining the validity of reservations:[387]

- One of these, which constitutes ordinary law, is the purely inter-State mechanism provided for in article 20 of the Vienna Conventions which can be adapted by special reservation clauses contained in the treaties concerned;
- Where the treaty establishes a body to monitor its implementation, it is now accepted that this body can also rule on the validity of reservations;
- But this still leaves open the possibility for the States and international organizations parties to have recourse, where appropriate, to the customary methods of peaceful settlement of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;[388]
- It may well be, moreover, that national courts themselves, like those in Switzerland,[389] also consider themselves entitled to determine the validity of a reservation in the light of international law.

162. It is clear that the multiplicity of possibilities for verification presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).[390] But in fact, this risk is inherent in any verification system — over time, any given body may take conflicting decisions — and it is perhaps better to have too much verification than no verification at all.

163. A more serious danger is that constituted by the succession of verifications over time, in the absence of any limitation of the duration of the period during which the verifications may be carried out. The problem does not arise in the case of the "Vienna regime" because article 20, paragraph 5, of the Convention sets a time limit of 12 months following the date of receipt of notification of the reservation (or the expression by the objecting State of its consent to be bound) on the period during which a State may formulate an objection.[391] A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional verification, which are unpredictable and depend on referral of the question to the monitoring or settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month

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[387] See A/CN.4/477/Add.1, paras. 211-215, on which the discussion that follows is largely based. For a very clear position in favour of the complementarity of systems of monitoring, see L. Lijnzaad, op. cit., note 84, pp. 97-98; see also G. Cohen-Jonathan, op. cit., note 290, p. 944.

[388] Subject, however, to the existence of "self-contained regimes", among which those instituted by the European and Inter-American Conventions on Human Rights or the African Charter should undoubtedly be included (cf. Bruno Simma, "Self-Contained Regimes", Netherlands Yearbook of International Law, 1985, pp. 130 et seq., or Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, Clarendon Press, Oxford, 1989, pp. 230 et seq.

[389] See note 377 above.

[390] See, in particular, P.-H. Imbert, who refers to the risks of incompatibility within the European Convention system, in particular between the positions of the Court and the Committee of Ministers (op. cit. note 95, pp. 617-619 (ICLQ 1984, pp. 590-591)).

[391] Note, however, that the problem nevertheless arises because ratifications and accessions are spread over time.

period.[392] Apart from the fact that none of the relevant texts currently in force provides for such a limitation, the limitation seems scarcely compatible with the very basis for action by monitoring bodies, which is designed to ensure respect for the general principles of international law (preservation of the object and purpose of the treaty). Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the 12-month rule often allows them insufficient time;[393] the same problem is liable to arise a fortiori in the monitoring bodies, as a result of which the latter may find themselves paralysed.

164. It could be concluded that the possibilities of cross-verification in fact strengthen the opportunity for the reservations regime, and in particular the principle of compatibility with the object and purpose of the Treaty, to play its real role. The problem is not one of setting up one possibility against another or, of affirming the monopoly of one mechanism,[394] but of combining them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States which wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties.

165. This situation does not exclude — in fact it implies — a degree of complementarity among the various methods of verification, as well as cooperation among the bodies concerned. In particular, it is essential that, in assessing the validity of a reservation, the monitoring bodies (as well as the dispute settlement bodies) should take fully into account the positions taken by the contracting parties through acceptances or objections. Conversely, States, which are required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even though the bodies cannot take legally binding decisions.[395]

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[392] See P.-H. Imbert, op. cit. note 22, p. 146, note 25, or note 63, pp. 113-114 and 130-131 (HRR 1981, pp. 36 and 44); *contra* Héribert Golsong, statement to the Rome Colloquium, 5-8 November 1975, *Report of the fourth international colloquium on the European Convention on Human Rights*, Council of Europe, Strasbourg, 1976, pp. 269-270 and "*Les réserves aux instruments internationaux pour la protection des droits de l'homme*", in Catholic University of Louvain, Fourth Colloquium of the Department of Human Rights, 7 December 1978, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme*, Bruylant, Brussels, 1982, para. 7 or R. W. Edwards Jr., op cit., note 220, pp. 387-388.

[393] See B. Clark, op. cit., note 201, pp. 312-314.

[394] Meanwhile it is the natural tendency of competent institutions to issue rulings; see the opposing points of view between the Human Rights Committee ("this is an inappropriate task for States parties in relation to human rights treaties" — General Comment No. 24, note 227, para. 18) and France ("it is [for States parties] and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty" — commentary note 290 above, para. 7).

[395] See, however, the extremely strong reaction to General Comment No. 24 found in the bill submitted to the United States Senate by Senator Helms on 9 June 1995 in terms of which "no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of (A) reporting to the Human Rights Committee in accordance with article 40 of the International Covenant on Civil and Political Rights, or (B) responding to any effort by the Human Rights Committee to use the procedures of articles 41 and 42 of the International Covenant on Civil

166. The examination of competence to assess the validity of reservations both from the viewpoint of the object and purpose of a treaty and from that of Treaty clauses excluding or limiting the ability to formulate reservations provided an opportunity to "revisit" some of the Preliminary Conclusions adopted by the Commission in 1997, in particular paragraphs 5, 6 and 8,[196] without taking any decisive action that would lead to a change in their meaning. It thus appears that the time has come to reformulate them in order to include them in the form of draft guidelines in the Guide to Practice, without specifically mentioning human rights treaties, even though, in practice, it is mainly in reference to them that the intertwining of powers to assess the validity of reservations poses a problem.

167. The relevant set of draft guidelines should no doubt begin with a general provision recalling that the various modalities of verification are not mutually exclusive but mutually reinforcing — in particular and including when the treaty establishes a body to monitor its implementation. This statement corresponds to the one found in a different form in paragraph 6 of the preliminary conclusions.[197] Consequently, draft guideline 3.2 could be worded as follows:

3.2 *Competence to assess the validity of reservations*

The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

– *The other contracting States [including, as applicable, their domestic courts] or other contracting organizations;*

– *Dispute settlement bodies that may be competent to interpret or apply the treaty; and*

– *Treaty implementation monitoring bodies that may be established by the treaty.*

168. The phrase contained in square brackets may not be necessary since domestic courts are, from the viewpoint of international law, an integral part of the "State", and they may, if need be, engage its responsibility.[198] That clarification could,

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and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).

(2) "CERTIFICATION — The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has (A) revoked its General Comment No. 24 adopted on November 2, 1994; and (B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights" (A Bill to authorize appropriations for the Department of State for fiscal years 1996 through 1999 ..., 104th Congress, 1st session, 2 908-Report No. 104-95, p. 87-88.

[196] See, in particular, para. 155 above.

[197] "The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties" (A/52/10, note 372, above, para. 157).

[198] See article 4 of the Commission's draft articles on responsibility of States for internationally wrongful acts ("Conduct of organs of a State") General Assembly resolution 56/83 of 12 December 2001, annex.

however, be useful to the extent that their intervention, even if it could have effects at the international level, takes place in the domestic sphere, while the first point of the proposed draft guideline refers above all to State bodies which have the capacity to commit the State at the international level.[399] On the other hand, it would seem unnecessary to mention the (limited) role of the depositary in this area: it is the subject of draft guidelines 2.1.7 and 2.1.8 (see paras. 159 and 160 above).

169. Draft guideline 3.2 implies that the monitoring bodies established by the treaty are competent to rule on the validity of reservations formulated by the contracting parties but does not expressly state this, unlike paragraph 5 of the Preliminary Conclusions adopted by the Commission in 1997, whereby even if the treaty is silent on the subject, the monitoring bodies established by normative multilateral treaties "are competent to comment upon and express recommendations with regard to the admissibility of reservations by States, in order to carry out the functions assigned to them".

170. The meaning of the last phrase is illuminated by paragraph 8 of the Preliminary Conclusions:

> "The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role."

171. A single draft guideline could establish the competence of the monitoring bodies to rule both on the validity of reservations, as seems imperative in view of the discussions on the subject, and on the limits of that power:

> 3.2.1 *Competence of the monitoring bodies established by the treaty*
>
> *When a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State or an international organization.*
>
> *The findings made by such a body in the exercise of this competence shall have the same legal force as that deriving from the performance of its general monitoring role.*

172. It should be noted in addition that the wording of draft guideline 3.2 as proposed in paragraph 167 above takes up only part of the substance of paragraph 6 of the Preliminary Conclusions of 1997:[400] it lists the persons or institutions competent to rule on the validity of reservations but does not specify that such powers are cumulative and not exclusive of each other. It is clearly essential that this be spelt out in a separate draft guideline:

> 3.2.4 *Plurality of bodies competent to assess the validity of reservations*
>
> *When the treaty establishes a body to monitor its application, the competence of that body neither excludes nor affects in any other way the competence of other contracting States or other contracting international organizations to assess the validity of reservations to a treaty formulated by a*

[399] Cf. article 7 of the 1969 and 1986 Vienna Conventions.

[400] See above, note 397.

State or an international organization, nor that of such dispute settlement bodies as may be competent to interpret or apply the treaty.

173. It does not seem appropriate, however, for the Commission to adopt at this stage one or more draft guidelines bearing on the consequences of the assessment of the validity of a reservation. Those consequences cannot be determined without a thorough study of the effects of the acceptance of and the objections to reservations. Such a study will not be able to be carried out until next year.

174. However, the question arises as to whether the Commission intends to incorporate in the Guide to Practice, in the form of draft guidelines, the recommendations set out in paragraphs 7 and 9 of the Preliminary Conclusions of 1997. These are formulated as follows:

> "7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation.
>
> ...
>
> "9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future."

175. It would certainly not be appropriate to include clauses of this type in draft articles intended for adoption in the form of an international convention. But such is not the case of the Guide to Practice currently being drawn up, which is understood to constitute a "code of recommended practices", designed to "guide" the practice of States and international organizations with regard to reservations but without being legally binding.[401] Moreover, the Commission already decided to include in the Guide at least one draft guideline clearly drafted in the form of a recommendation to States and international organizations.[402]

176. In the same spirit, it might wish to recommend that States and international organizations:

- Include in multilateral treaties that they conclude in the future and that provide for the establishment of a monitoring body, specific clauses conferring competence on that body to assess the validity of reservations and specifying the legal effect of such assessment (or attach protocols to that end to existing treaties);
- Cooperate with such bodies and give due consideration to their findings as to the validity of reservations.

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[401] See in this connection the commentary on draft guideline 2.5.3, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. VIII, sect. C.2.

[402] See draft guideline 2.5.3 ("Periodic review of the usefulness of reservations"), and paragraphs (5) and (6) of the commentary, ibid.

177. Draft guideline 3.2.2, which would meet the first of these concerns (and would reflect paragraph 7 of the Commission's Preliminary Conclusions[403]) could be worded as follows:

> 3.2.2 *Clauses specifying the competence of monitoring bodies to assess the validity of reservations*
>
> *States or international organizations should insert, in treaties establishing bodies to monitor their application, clauses specifying the nature and, where appropriate, the limits of the competence of such bodies to assess the validity of reservations. Protocols to existing treaties could be adopted to the same ends.*

178. The call to States and international organizations to cooperate with monitoring bodies, in paragraph 9 of the Commission's Preliminary Conclusions,[403] could be carried over into a draft guideline 3.2.3, which should however be worded differently so as to remove the ambiguity in the wording adopted in 1997: the phrase "... if such bodies were to be granted competence to that effect *in the future*" seems to imply that they do not have such competence at the present time. This is not so, since there is no question but that they may assess the validity of reservations to treaties whose observance they are required to monitor.[404] On the other hand, they may not:

- Compel reserving States and international organizations to accept their findings, since they do not have general decision-making power;[405] or
- In any case, take the place of the author of the reservation in determining the consequences of the non-validity of a reservation.[406]

179. In the light of these remarks, draft guideline 3.2.3 could be worded as follows:

> 3.2.3 *Cooperation of States and international organizations with monitoring bodies*
>
> *States and international organizations that have formulated reservations to a treaty establishing a body to monitor its application are required to cooperate with that body and take fully into account that body's assessment of the validity of the reservations that they have formulated. When the body in question is vested with decision-making power, the author of the reservation is bound to give effect to the decision of that body [provided that it is acting within the limits of its competence].*

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[403] See above, para. 174.

[404] See above, para. 155; see also A/CN.4/477/Add.1, paras. 206-209.

[405] See the second paragraph of draft guideline 3.2.2 above, para. 171, and A/CN.4/477/Add.1, paras. 234-240.

[406] See para. 10 of the Preliminary Conclusions (A/52/10, note 372 above, para. 157) and A/CN.4/477/Add.1, paras. 218-230.

180. Although paragraph 9 of the Preliminary Conclusions is drafted as a recommendation ("The Commission calls upon States ..."), it seemed possible to adopt firmer wording for draft guideline 3.2.3: there is no doubt that contracting parties have a general duty to cooperate with the treaty monitoring bodies that they have established and, if those bodies are vested with decision-making power, that they must abide by their decisions. However, so long as the difficult question of the effect of a finding of non-validity of reservations has not been considered, it would be premature to spell out the admissible scope of a decision to that effect. This precautionary wording would no doubt be intensified if the Commission were to retain the words between square brackets, which clearly imply that the question of the limits of the competence of the monitoring bodies in this regard remains open.

2. Consequences of the non-validity of a reservation

181. Just as it does not specify the consequences of the formulation of a reservation prohibited, expressly (subparagraph (a) or implicitly subparagraph (b)), by the treaty to which it refers, so article 19 does not allude to the effects of the formulation of a reservation prohibited by subparagraph (c),[407] and nothing in the text of the Vienna Convention indicates how these provisions relate to those of article 20, concerning acceptance of reservations and objections. The question has been raised as to whether this "normative gap"[408] may not have been deliberately created by the authors of the Convention.[409]

182. It must in any case be acknowledged that the *travaux préparatoires* for subparagraph (c) are confused and do not provide any clearer indications of any consequences that the drafters of the Convention intended to draw from the incompatibility of a reservation with the object and purpose of the Convention:[410]

- In draft article 17 proposed by Waldock in 1962, the object and purpose of the treaty appeared only as guidance for the reserving State itself;[411]
- The debates on that draft were particularly confused during the Commission's plenary meetings[412] and mainly served to bring to light a split between members who advocated an individual determination by States and those who were in favour of a collegial mechanism (see para. 152 above), without the consequences of such determination being really discussed;
- However, after the Drafting Committee had recast the draft along lines very close to the wording of the present article 19, the overriding feeling seems to have been that the object and purpose constituted a criterion by which the

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[407] Cf. D. W. Greig, op. cit., note 29, p. 83.

[408] F. Horn, op. cit., note 37, p. 131; see also J. Combacau, "Logique de la validité ...", note 347, p. 199.

[409] See P.-H. Imbert, op. cit., note 22, pp. 137-140.

[410] It should be recalled that this criterion was included in the draft belatedly, going back only to Waldock's first report in 1962; see above, paras. 72-73.

[411] Article 17, para. 2 (a); see above para. 72; see also the remarks by the Special Rapporteur at the fourteenth session (*Yearbook* ... 1962, vol. I, 651st meeting, 25 May 1962, para. 85).

[412] See *Yearbook* ... 1962, vol. I, pp. 139-168 and 172-175.

validity of the reservation should be assessed.[413] This is attested by the new amendment to article 18 bis, which entailed, on the one hand, the inclusion of the criterion of incompatibility and, on the other hand, and most importantly, the modification of the title of that provision, which became "The legal effect of reservations" instead of "The validity of reservations",[414] which shows that their validity is the subject of draft article 17 (which became article 19 of the Convention);

- The deft wording of the commentary on draft articles 18 and 20 (corresponding respectively to articles 19 and 21 of the Convention) adopted in 1962 leaves the question open: it affirms both that the compatibility of the reservation with the object and purpose of the treaty is the criterion governing the formulation of reservations and that, since this criterion "is to some extent a matter of subjective appreciation (...) the only means of applying it in most cases will be through the individual State's acceptance or rejection of the reservation", but only "in the absence of a tribunal or an organ with standing competence".[415]

- In his 1965 report, the Special Rapporteur also noted, in connection with draft article 19 relating to treaties that are silent on the question of reservations (subsequently, article 20 of the Convention), that "the Commission recognized that the 'compatibility' criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State's acceptance or rejection of the reservation"; it also recognized that "the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication".[416]

- The Commission's commentaries on draft articles 16 and 17 (subsequently, 19 and 20 respectively) are no longer so clear, however, and confine themselves to indicating that "the admissibility or otherwise of a reservation under paragraph (c) (...) is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States", and that, for that reason, draft article 16 (c) should be understood "in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations";[417]

- At the Vienna Conference, some delegations tried to put more content into the criterion of the object and purpose of the treaty. Accordingly, the Mexican delegation proposed that the consequences of a judicial decision recognizing the incompatibility of a reservation with the object and purpose of the treaty

[413] See particularly *Yearbook* ... 1962, vol. I, pp. 234-235. During the discussion on new article 18 bis, entitled "The validity of reservations", all the members referred to the criterion of compatibility with the object and purpose of the treaty, which was not mentioned, however, in the draft adopted by the Drafting Committee.

[414] *Yearbook* ... 1962, vol. I, p. 234.

[415] *Yearbook* ... 1962, vol. II, p. 181, para. 22.

[416] Fourth report, A/CN.4/177, note 20 above, p. 52, para. 9.

[417] *Yearbook* ... 1966, vol. II, p. 207, para. 17.

should be spelt out.[418] But it was mainly those in favour of a system of collegial assessment who tried to draw concrete conclusions from the incompatibility of a reservation with the object and purpose of the treaty.[419]

183. Moreover, as noted in paragraph 52 above, nothing, either in the text of article 19 or in the *travaux préparatoires*, gives grounds for thinking that a distinction should be made between the different cases: *ubi lex non distinguit, nec nos distinguere debemus*. In all three cases, as clearly emerges from the chapeau of article 19, a State is prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of subparagraphs (a) and (b) of article 19 (see para. 53 above), there is no reason to draw different conclusions from subparagraph (c). Three objections, of unequal weight, have however been raised to this conclusion.

184. First, it has been pointed out that whereas the depositaries reject reservations prohibited by the treaty, they communicate to other contracting States the text of those that are, prima facie, incompatible with its object and purpose.[420] Such indeed is the practice followed by the Secretary-General of the United Nations,[421] albeit that its significance is only relative. For "only *if there is no doubt* that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit (...) *In case of doubt*, the Secretary-General shall request clarification from the State concerned (...) However, the Secretary-General feels that *it is not incumbent upon him to request systematically such clarifications*; rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations".[422] In other words, the difference noted in the practice of the Secretary-General is not based on the distinction between the situations in subparagraphs (a) and (b) on the one hand, and paragraph (c) on the other, of article 19, but on the certainty that the reservation is contrary to the treaty. When an interpretation is necessary, the Secretary-General relies on States; such is always the case when the reservation is incompatible with the object and purpose of the treaty; it may also be so when the reservations are expressly or implicitly prohibited. Furthermore, in draft guideline 2.1.8 of the Guide to Practice, the Commission, in a context of progressive development, considered that "[w]here, in the opinion of the depositary, a reservation is manifestly [impermissible],[423] the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such [impermissibility].[424] To that end, as is noted in paragraph 160 above, "[t]he Commission considered that

[418] Ibid., vol. I, 21st meeting, para. 63. Mexico proposed two solutions. The first was that the State that had formulated the incompatible reservation should be obliged to withdraw it, failing which it should forfeit the right to become a party to the treaty; and the second was that the treaty in its entirety should be deemed not to be in force between the reserving State and the objecting State.

[419] See in particular the statements of the various delegations, cited above, notes 358 and 360.

[420] Cf. G. Gaja, op. cit., note 130, p. 317.

[421] See the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, (ST/LEG/7/Rev. 1), New York, 1997, paras. 191 and 192.

[422] Ibid., paras. 194-196 — emphasis added. The practice followed by the Secretary-General of the Council of Europe is similar, except that, in the event of difficulty, he/she may consult (and does consult) the Committee of Ministers (see J. Polakiewicz, op. cit., note 27, pp. 90-93).

[423] On the significance of these square brackets, see below, para. 193.

[424] A/57/10, note 383 above.

it was not justified to make a distinction between the different types of 'impermissibility' listed in article 19".[425]

185. Second, it has been pointed out in the same spirit that in the situation in subparagraphs (a) and (b), the reserving State could not be unaware of the prohibition and that, for that reason, it should be assumed to have accepted the treaty as a whole, notwithstanding its reservation (doctrine of "divisibility").[426] There is no doubt that it is less easy to determine objectively that a reservation is incompatible with the object and purpose of the treaty than it is when there is a prohibition clause. The remark is certainly relevant, although not decisive. It is less obvious than is sometimes thought to determine the scope of reservation clauses, especially when the prohibition is implicit, as in the situation in subparagraph (b).[427] Furthermore, it may be difficult to determine whether or not a unilateral statement is a reservation, and the State concerned may have thought in good faith that it had not violated the prohibition while considering that its consent to be bound by the treaty depends on the acceptance of its interpretation thereof.[428] And, in reality, while a State is assumed not to be ignorant of the prohibition resulting from a reservation clause, by the same token it must be aware that it cannot divest a treaty of its substance through a reservation that is incompatible with the treaty's object and purpose.

186. Third and most importantly, it has been argued that paragraphs 4 and 5 of article 20 describe one single case in which the possibility of accepting a reservation is limited: when the treaty contains a contrary provision;[429] *a contrario*, this would allow for complete freedom to accept reservations, notwithstanding the provisions of article 19 (c).[430] While it is true that, in practice, States infrequently object to reservations which are very possibly contrary to the object and purpose of the treaty to which they relate and that, as a consequence, the rule contained in article 19 (c)[431] is deprived of concrete effect, at least in the absence of an organ which is competent to take decisions in that regard,[432] many arguments, based on the text of the Convention itself, conflict with that reasoning:

- Article 19 and 20 of the Convention have distinct purposes; the rules that they establish are applicable at different stages of the formulation of a reservation: article 19 sets out the cases in which a reservation may not be formulated; article 20 describes what happens when it has been formulated;[433]

[425] Ibid., para. (5) of the commentary on draft guideline 2.1.8.

[426] See A. Fodella, op. cit., note 66, pp. 143-147.

[427] See above, paras. 39-42.

[428] On the distinction between reservations and simple or conditional interpretative declarations, see draft guidelines 1.3 to 1.3.3 of the Commission's Guide to Practice and the commentaries thereon *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), chap. VI, sect. C.2.

[429] The wording used in both provisions is "... unless the treaty otherwise provides ...".

[430] See D. W. Greig, op. cit., note 29, pp. 134-137.

[431] See, in particular, D. Carreau, *Droit international*, Pedone, 2004, p. 137; G. Gaja, op. cit., note 130, pp. 315-318; D. W. Greig, op. cit., note 29, pp. 86-90 or P.-H. Imbert, op. cit., note 22, pp. 134-137.

[432] See above, paras. 157-158; see also M. Coccia, op. cit., note 34, p. 33 or R. Szafarz, op. cit., note 84, p. 301.

[433] See D. Bowett, op. cit., note 88, p. 80 or C. J. Redgwell, op. cit., note 233, pp. 404-406.

- The proposed interpretation would strip subparagraph (c) of article 19 of all useful effect: as a consequence, a reservation which is incompatible with the object and purpose of the treaty would have exactly the same effect as a compatible reservation;

- It also renders meaningless article 21, paragraph 1, which stipulates that a reservation is "established" only "in accordance with articles 19, 20 and 23" (see para. 14 above and para. 187 below); and

- It introduces a distinction between the scope of article 19 (a) and (b), on the one hand, and article 19 (c), on the other, which the text in no way authorizes (see paras. 52 and 183 above).

187. Consequently, there is nothing in the text of article 19 of the Vienna Conventions, or in its context, or in the travaux préparatoires for the Conventions, or even in the practice of States or depositaries to justify drawing such a distinction between the consequences, on the one hand, of the formulation of a reservation in spite of a treaty-based prohibition (article 19 (a) and (b)) and, on the other, of its incompatibility with the object and purpose of the treaty (article 19 (c)). This could be the subject of a new draft guideline 3.3:

3.3 *Consequences of the non-validity of a reservation*

A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and the purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity.

188. Once it has been accepted that the three subparagraphs of article 19 have the same function and that a State cannot formulate a reservation which is contrary to their provisions, it still remains to be seen what happens when, in spite of these prohibitions, a State formulates a reservation. If it does so, the reservation certainly cannot have the legal effects which, pursuant to article 21, are clearly contingent on its "establishment" "in accordance with articles 19 [in its entirety], 20 and 23".[434] This effect, to some extent *a contrario*, of the non-validity of a reservation can be studied only in conjunction with the effects of reservations, of their acceptance and of the objections made to them.

189. But the question still remains: on the one hand, should it be concluded that, by proceeding thus, the reserving State is committing an internationally wrongful act which engages its international responsibility? On the other hand, are other States prevented from accepting a reservation formulated in spite of the prohibitions contained in article 19?

190. With regard to the first of those two questions, it has been argued that a reservation which is incompatible with the object and purpose of the treaty[435] "amounts to a breach of [the] obligation" arising from article 19 (c). "Therefore, it is a wrongful act, entailing such State's responsibility vis-à-vis each other party to the treaty. It does not amount to a breach of the treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding 'incompatible'

[434] Article 21 ("Legal effects of reservations and of objections to reservations"): "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...".

[435] But this should also hold true *a fortiori* for reservations prohibited by the treaty.

reservations".[436] This reasoning, based expressly on the rules governing the responsibility of States for internationally wrongful acts,[437] is not entirely convincing.[438]

191. It is clear that "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character",[439] and that a breach of an obligation not to act (in this case, not to formulate a reservation which is incompatible with the object and purpose of the treaty) is an internationally wrongful act liable to engage the international responsibility of a State in the same way as an obligation to act. But that question has not yet arisen in the sphere of the law of responsibility. As the International Court of Justice forcefully recalled in the case concerning the Gabčíkovo-Nagymaros Project, that branch of law and the law of treaties "obviously have a scope that is distinct"; while "[a] determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties",[440] it falls to this same branch of law to determine whether or not a reservation may be formulated. It follows, at the very least, that the potential responsibility of a reserving State cannot be determined in light of the Vienna rules and that that responsibility is not relevant to the "law of reservations". Furthermore, even if damage is not a requirement for engaging the responsibility of a State,[441] it conditions the implementation of the latter and, in particular, reparation,[442] whereas, for an invalid reservation to have concrete consequences in the sphere of the law of responsibility, the State relying on it must be able to invoke an injury, which is highly unlikely.

192. But there is more. It is telling that no State has ever, when formulating an objection to a prohibited reservation, invoked the responsibility of the reserving State: the consequences of the observation that a reservation is not valid may be varied,[443] they never constitute an obligation to make reparation and, if an objecting State were to invite the reserving State to withdraw its reservation or to amend it

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[436] M. Coccia, op. cit., note 34, pp. 25-26.

[437] Cf. articles 1 and 2 of the Commission's draft articles annexed to General Assembly resolution 56/83 of 12 December 2001.

[438] See G. Gaja, op. cit., note 130, p. 314, note 29.

[439] Draft articles on the responsibility of States for internationally wrongful acts, General Assembly resolution 56/83, article 12.

[440] Judgment of 25 September 1997, note 180 above, p. 38, para. 47; see also the arbitral ruling of 30 April 1990 in the *Rainbow Warrior* case, *Revue Générale de Droit International Public*, 1990, p. 851, para. 75. On the relationships between the two branches of law, see, in particular, D. Bowett, "Treaties and State Responsibility", *Méls. Virally*, note 347, pp. 137-145; J. Combacau, "Logique de la validité ...", note 347, pp. 195-203; P.-M. Dupuy, "Droit des traités, codification et responsabilité internationale", Annuaire Français de Droit International, 1997, pp. 7-30; Ph. Weckel, "Convergence du droit des traites et du droit de la responsabilité", *Revue Générale de Droit International Public*, 1998, pp. 647-684; P. Weil, "Droit des traites et droit de la responsabilité", *Le droit international dans un monde en mutation* — Liber Amicorum *Jiménez de Aréchaga*, FCU, Montevideo, 1994, pp. 523-543; A Yahi, "La violation d'un traité: L'articulation du droit des traités et du droit de la responsabilité internationale", *Revue belge de droit international*, 1993, pp. 437-469.

[441] See article 1 of the Commission's draft articles, note 437 above.

[442] See articles 31 and 34 of the Commission's draft articles.

[443] They arise, *a contrario*, from article 20 and, above all, article 21 of the Vienna Conventions.

within the framework of the "reservations dialogue",[444] it would not be acting in the sphere of law of responsibility but in that of the law of treaties alone.

193. That is, moreover, the reason why the Commission, which had, at first, retained the term "illicite", as an equivalent to the English word "impermissible", to describe reservations formulated in spite of the provisions of article 19, decided, in 2002, to reserve its position on this matter pending an examination of the effect of such reservations (see para. 6 above). It seems certain that the formulation of a reservation excluded by any of the subparagraphs of article 19 falls within the sphere of the law of treaties and not within that of the responsibility of States for internationally wrongful acts. Accordingly, it does not entail the responsibility of the reserving State.[445]

194. While this seems self-evident, it is nonetheless advisable to spell it out in draft guideline 3.1.1 of the Guide to Practice, in order to remove any remaining ambiguity. That guideline could read as follows:

> 3.1.1 *Non-validity of reservations and responsibility*
>
> *The formulation of an invalid reservation produces its effects within the framework of the law of treaties. It shall not, in itself, engage the responsibility of the State or international organization which has formulated it.*

195. The question still remains as to whether the other parties may, collectively or unilaterally, accept a reservation which does not fulfil the conditions set out in any of the subparagraphs of article 19. This is the central problem which divides the advocates of the opposability school from those who favour the theory of permissibility.[446]

196. The central issue, on which the Vienna Convention hardly sheds any light, is whether the validity of reservations is an objective question or whether it depends on the subjective opinions of the other States parties. Professor Derek Bowett describes that issue as follows:

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[444] After a great deal of thought, the Special Rapporteur has been convinced that this notion cannot be examined exclusively in relation to the procedure for the formulation of acceptances of reservations or objections but is inextricably linked to the effects produced by the acceptance of a reservation or by objections. In contrast to what he had originally envisaged (see A/CN.4/508/Add.3, para. 222, A/CN.4/518, para. 31 and A/CN.4/535/Add.1, para. 70), the "reservations dialogue" will therefore form the subject of a subsequent report.

[445] Nor, indeed, that of States which implicitly accept a reservation which is prohibited or incompatible with the object and purpose of the treaty (see, however, L. Lijnzaad, op. cit., note 84, p. 56: "The responsibility for incompatible reservations is (...) shared by reserving and accepting States" — but it appears from the context that the author does not consider either the incompatible reservation or its acceptance as internationally wrongful acts; rather than "responsibility" in the strictly legal sense, it is no doubt necessary to refer here to "accountability" in the sense of having to provide an explanation.

[446] On these two schools, see the preliminary report on reservations to treaties, A/CN.4/470, paras. 101-105; paras. 196-198 below are inspired by paras. 101 and 102 of that report; see also, in particular, J. K. Koh, op. cit., note 153, pp. 71-116, *passim*, in particular, pp. 75-77; see also Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", British Yearbook of International Law, 1993, pp. 243-282, particularly pp. 263-269; R. Riquelme Cortado, op. cit., note 27, pp. 73-82 and Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester University Press, 2nd ed., 1984, p. 81, note 78.

> "The issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as matter of policy, other Parties find the reservations acceptable or not. The consequence of finding a reservation 'impermissible' may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State's acceptance of the treaty as a whole".[447]

197. This particularly authoritative opinion represents the quintessence of the "permissibility" (or "objective validity") school. In contrast, for those authors who claim allegiance to the opposability school, in the Vienna Convention system, "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State". Hence, article 19 (c) is seen as "a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but not more than that".[448]

198. For those who espouse the thesis of opposability, the answers to questions about the validity of reservations, which are wholly subjective, are to be found in the provisions of article 20 of the 1969 and 1986 Conventions: "The validity of a reservation depends, under the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty". [449] The advocates of the permissibility thesis, on the other hand, take it for granted that an invalid reservation cannot be invoked against other States; thus "the issue of 'opposability' is the secondary issue and presupposes that the reservation is permissible. Whether a Party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and objecting States is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review".[447]

199. Most authors, however, regardless of which of these two schools they belong to, believe that a reservation formulated in spite of a treaty-based prohibition is null and void[450] and those who advocate "permissibility" consider that its formulation invalidates the expression of consent to be bound.[451] If this is the case, these conclusions apply just as much to the question concerning the effects of a reservation formulated in spite of the provisions of article 19 (c) (see para. 53 above).

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[447] Derek W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", British Yearbook of International Law, 1976-1977, p. 88.

[448] J. M. Ruda, op. cit., note 17, p. 190. For similar points of view, see Jean Combacau, *Le droit des traités Presses Universitaires de France*, Paris, "*Que sais-je?*", No. 2613, 1991, p. 60 or op. cit., note 347, p. 200; Giorgio Gaja, op. cit., note 130, pp. 313-320; P.-H. Imbert, op. cit., note 22, pp. 134-137; P. Reuter, op. cit., note 28, p. 74 or K. Zemanek, op. cit., note 347, pp. 331-333.

[449] J. M. Ruda, op. cit. note 17, p. 190.

[450] See, for example, D. W. Bowett, op. cit., note 447, or G. Gaja, op. cit. note 130, pp. 318-320; see also para. 53 above.

[451] D. Bowett, op. cit. note 447, p. 84; see the criticisms of these positions by D. W. Greig, op. cit. note 29, pp. 56-57. See also C. Tomuschat, op. cit. note 55, p. 467; see the references to the Commission's discussions, ibid., note 12; these discussions are less conclusive in this regard than the author would have us believe.

200. It is too early for the Commission to take a position on whether the nullity of the reservation invalidates the consent to be bound itself: this issue divides the commentators and will be settled only when the role of acceptance of, and objections to, reservations has been studied in greater depth. Nonetheless, it seems reasonable to establish as of now the solution on which those who espouse permissibility and those who espouse opposability agree, which also accords with the positions taken by the human rights treaty bodies (A/CN.4/477/Add.1, paras. 194-201), namely that failure to respect the conditions for validity of formulation of reservations laid down in article 19 of the Vienna Conventions and repeated in draft guideline 3.1 nullifies the reservation. In other words, even if the Commission cannot yet decide on the consequences of the nullity of the reservation, it can still establish the principle of the nullity of invalid reservations in a draft guideline 3.3.2.

3.3.2 *Nullity of invalid reservations*

A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.

201. Consequently, there is no doubt that unilateral acceptance of a reservation formulated in spite of article 19, subparagraphs (a) and (b), is excluded. This was very clearly confirmed during the Vienna Conference by the Expert Consultant Sir Humphrey Waldock on the subject of prohibited reservations and no objections were raised.[452] For, as indicated above in paragraphs 52 and 183-187, there is no reason not to extend this common sense solution to reservations falling under subparagraph (c). In reality, the lack of validity of reservations formulated in spite of any one of the three subparagraphs of article 19 is based on the same fundamental considerations: a State cannot blow hot and cold; a State cannot formulate a prohibited reservation or divest the treaty of its very purpose by formulating a reservation that is incompatible with the object and purpose of the treaty, without going against the principle of good faith; nor can the other Parties accept such a reservation unilaterally.[453] For the result would be to modify the treaty in the relations between the reserving State and the accepting State in a way that would be incompatible with article 41 (1) (b) (ii) of the Vienna Convention, which specifically excludes any modification of this kind if it relates "to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".[454]

202. As a result, acceptance by one or several contracting parties of a reservation that is invalid, either because it is prohibited by the treaty or because it is incompatible with its object and purpose, would not change the intrinsic nullity of the reservation: the reservation is null because it is not envisaged by the treaty, of

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[452] *Summary records* (A/CONF.39/11), note 358 above, Committee of the Whole, 25th meeting, 16 April 1968, para. 2. At the plenary meeting, the representative of Canada said that he would vote for article 16 on the understanding that this interpretation was "correct", and he was not contradicted (*Summary records* (A/CONF.39/11/Add.1), note 60 above, 10th plenary meeting, 29 April 1969, pp. 29-30, para. 33). See also paras. 50-51 above, D. Bowett, op. cit. note 447, pp. 82-83 and C. Tomuschat, who notes that during the Commission's discussions, members were unanimous on this point, op. cit. note 55, p. 467.

[453] V. L. Lijnzaad, op. cit. note 84, pp. 55-59.

[454] In this regard, see D. W. Greig, op. cit. note 29, p. 57 or L. Sucharipa-Behrman, op. cit. note 202, pp. 78-79; see however *contra* the comments made by Jiménez de Aréchaga and Amado during the discussions on Waldock's proposals of 1962 (Yearbook ... 1962, vol. I, 653rd meeting, 29 May 1962, p. 158, paras. 44-45 and p. 160, para. 63).

which it destroys the equilibrium sought by all the parties, and because "certain of the parties only"[455] may not call the treaty into question in their relations *inter se*. This could be stated specifically in a draft guideline 3.3.3:

3.3.3 *Effect of unilateral acceptance of an invalid reservation*

Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

203. The aim of this draft guideline is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is invalid, it remains null even if it is accepted. This observation accords with article 21, which envisages the effects of reservations only if they are "established" in accordance not only with articles 20 and 23 of the Vienna Conventions but also, explicitly, with article 19. Furthermore, the principle established in draft guideline 3.3.3 is in line with the provisions of article 20; in particular, it does not exclude the possibility that acceptance may have other effects, in particular, of allowing the entry into force of the treaty with regard to the reserving State or international organization.

204. This does not necessarily mean that the Parties cannot agree to accept a reservation in spite of the prohibition envisaged in the treaty. Draft article 17 (1) (b) proposed by Waldock in 1962 envisaged "the exceptional case of an attempt to formulate a reservation of a kind which is actually prohibited or excluded by the terms of the treaty";[456] he provided that, in that case, "the prior consent of all the other interested States" is required.[457] This provision was not retained in the Commission's draft articles of 1962[458] or 1966 and does not appear in the Convention.[459]

205. This silence does not solve the problem. Indeed, it can be argued that the Parties always have a right to amend the treaty by general agreement *inter se* in

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[455] See article 41 of the Vienna Conventions: "Agreements to modify multilateral treaties between certain of the parties only".

[456] First report on the law of treaties, A/CN.4/144, in *Yearbook ... 1962*, vol. II, p. 65, para. (9).

[457] See ibid., p. 60 for the text of the draft article.

[458] The provision came up against opposition from Tunkin (ibid., vol. I, 651st meeting, 25 May 1962, para. 19) and Castrén (ibid., para. 68 and 652nd meeting, 28 May 1962, para. 30), who believed it to be superfluous, and it disappeared from the simplified draft retained by the Drafting Committee (ibid., 663rd meeting, 18 June 1962, para. 3).

[459] This solution was, however, retained in the reservation clause of the European Agreement concerning the work of crews of vehicles engaged in international road transport of 1 July 1970, of which article 21, para. 2 provides as follows: "If at the time of depositing its instrument of ratification or accession a State enters a reservation other than that provided for in paragraph 1 of this article, the Secretary-General of the United Nations shall communicate the reservation to the States which have previously deposited their instruments of ratification or accession and have not since denounced this Agreement. The reservation shall be deemed to be accepted if none of the said States has, within six months after such communication, expressed its opposition to acceptance of the reservation. Otherwise the reservation shall not be admitted, and, if the State which entered the reservation does not withdraw it the deposit of that State's instrument of ratification or accession shall be without effect. [...]". On the basis of this provision and in the absence of an objection from the other States parties to the Convention, the States members of the European Economic Community formulated a reservation, not authorized by the Agreement, excluding the application of the agreement to certain operations. See the reservations made by the States which, at the time, were members of the Community, *Multilateral treaties* ... note 217 above, vol. I, pp. 816-818.

accordance with article 39 of the Vienna Conventions and that nothing prevents them from adopting a unanimous agreement[460] to that end on the subject of reservations.[461] This possibility, which accords with the principle of consensus that underpins all treaty law,[462] nevertheless poses some very difficult problems. The first problem is whether the absence of objections by all the other parties within a 12-month period is equivalent to a unanimous agreement constituting an amendment to the reservation clause. At first sight, article 20, paragraph 5, of the Convention seems to answer this in the affirmative.

206. However, after further consideration, this is not necessarily the case: silence on the part of the State Party does not mean that it is taking a position vis-à-vis the validity of the reservation; at most, it means that the reservation may be invoked against it[463] and that the State undertakes not to object to it in the future.[464] This is proven by the fact that it cannot be argued that monitoring bodies — whether the International Court of Justice, an arbitral tribunal or a human rights treaty body — are prevented from assessing the validity of a reservation even if no objection has been raised to it.[465] In the absence of practice,[466] it is difficult to decide on the course to be taken; the Commission may wish to seek inspiration from the solution it chose on the subject of the late formulation of a reservation and determine that a reservation that is prohibited by the treaty or is clearly contrary to its object and purpose cannot be formulated "except if none of the other contracting parties objects to the late formulation of the reservation",[467] having been duly consulted by the depositary.[468]

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[460] But not an agreement between certain of the parties only; see para. 201 above.

[461] In this regard, see D. W. Greig, op. cit. note 29, pp. 56-57 or L. Sucharipa-Behrman, op. cit. note 202, p. 78. This is also the position of D. W. Bowett, but he considers that this possibility does not come under the law of reservations (op. cit. note 447, p. 84; see also C. Redgwell, op. cit. note 456, p. 269).

[462] See notes 252 and 253 above. In addition, it cannot reasonably be argued that the rules established in article 19, and in particular subparagraph (c), constitute peremptory norms of general international law from which the parties may not derogate by agreement.

[463] In this regard, M. Coccia, op. cit. note 34, p. 26; F. Horn, op. cit. note 37, pp. 121 and 131 or K. Zemanek, op. cit. note 347, pp. 331-332; see also G. Gaja, op. cit. note 130, pp. 319-320. As pointed out quite rightly by L. Lijnzaad, it is not a question of acceptance *stricto sensu*, "[i]t is the problem of inactive States whose laxity leads to the acceptance of reservations contrary to object and purpose" (op. cit. note 84, p. 56).

[464] And even this is not evident; the Commission will have to resolve this important point when it discusses the question of the effects of acceptance and objections.

[465] See D. W. Greig, op. cit. note 29, pp. 57-58. Even during the Commission's discussions in 1962, Bartoš had made the point that it was almost inconceivable that the simple operation of time limits for the making of objections could mean that a clearly invalid reservation "could no longer be challenged" (*Yearbook ... 1962*, vol. I, 654th meeting, 30 May 1962, p. 163, para. 29).

[466] See, however, Switzerland's "reservation of neutrality" to the Covenant of the League of Nations which was accepted in spite of the prohibition of reservations to the Covenant (see note 64 above).

[467] See draft guidelines 2.3.1, 2.3.2 and 2.3.3 of the Guide to Practice and their commentary, in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 56* (A/56/10), chap. VI, sect. C.2. This solution reintroduces "through the back door" the system of unanimity, which some reservation clauses already explicitly retain (see the examples given by W. Bishop, *Jr.*, op. cit., note 96, p. 324).

[468] See draft guideline 2.1.8 ("Procedure in case of manifestly [impermissible] reservations") and its commentary A/57/10, note 383 above. For more on this issue, see R. Riquelme Cortado, op. cit., note 27, pp. 223-230.

207. In that case, a draft guideline 3.3.4 could provide as follows:

3.3.4 *Effect of collective acceptance of an invalid reservation*

A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose may be formulated by a State or an international organization if none of the other contracting parties objects to it after having been expressly consulted by the depositary.

During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of legal problems raised by the reservation.

208. The wording of the second paragraph of this draft guideline is modelled on that of the second paragraph of draft guideline 2.1.8 and responds to the same imperatives.[409]

[409] See A/57/10, note 385 above.

Annex

Text of the draft guidelines on reservations to treaties proposed in the present report

3. Validity of reservations

3.1. Freedom to formulate reservations

A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;

(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations expressly prohibited by the treaty

A reservation is prohibited by the treaty if it contains a particular provision:

– Prohibiting all reservations;

– Prohibiting reservations to specified provisions;

– Prohibiting certain categories of reservations.

3.1.2 Definition of specified reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty.

3.1.3 Reservations implicitly permitted by the treaty

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.

[3.1.3/3.1.4 Compatibility of reservations authorized by the treaty with its object and purpose

Where the treaty expressly or implicitly authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.]

3.1.4 Non-specified reservations authorized by the treaty

Where the treaty authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.

3.1.5 Definition of the object and purpose of the treaty

For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its raison d'être.

3.1.6 Determination of the object and purpose of the treaty

1. In determining the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.

2. For that purpose, the context includes the preamble and annexes. Recourse may also be had, in particular, to the preparatory work of the treaty and the circumstances of its conclusion, and to the title of the treaty and, where appropriate, the articles that determine its basic structure [and the subsequent practice of the parties.]

3.1.7 Vague, general reservations

A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty.

3.1.8 Reservations to a provision that sets forth a customary norm

1. The customary nature of a norm set forth in a treaty provision shall not in itself constitute an obstacle to the formulation of a reservation to that provision.

2. A reservation to a treaty provision which sets forth a customary norm shall not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which are bound by that norm.

3.1.9 Reservations to provisions setting forth a rule of jus cogens

A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.

3.1.10 Reservations to provisions relating to non-derogable rights

A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights provided that the reservation in question is not incompatible with the essential rights and obligations arising out of that provision. In assessing the compatibility of the reservation with the object and purpose of the provision in question, account must be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.11 Reservations relating to the application of domestic law

A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to preserve the integrity of its domestic law may be formulated only if it is not incompatible with the object and purpose of the treaty.

3.1.12 Reservations to general human rights treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the basic structure of the treaty, and the seriousness of the impact the reservation has upon it.

3.1.13 Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(i) The provision to which the reservation relates constitutes the raison d'être of the treaty; or

(ii) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

3.2. Competence to assess the validity of reservations

The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

- The other contracting States [including, as applicable, their domestic courts] or other contracting organizations;
- Dispute settlement bodies that may be competent to interpret or apply the treaty; and
- Treaty implementation monitoring bodies that may be established by the treaty.

3.2.1 Competence of the monitoring bodies established by the treaty

Where a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State or an international organization.

The findings made by such a body in the exercise of this competence shall have the same legal force as that deriving from the performance of its general monitoring role.

3.2.2 Clauses specifying the competence of monitoring bodies to assess the validity of reservations

States or international organizations should insert, in treaties establishing bodies to monitor their application, clauses specifying the nature and, where appropriate, the limits of the competence of such bodies to assess the validity of reservations. Protocols to existing treaties could be adopted to the same ends.

3.2.3 Cooperation of States and international organizations with monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a body to monitor its application are required to cooperate with that body and take fully into account that body's assessment of the validity of the reservations that they have formulated. When the body in question is vested with decision-making power, the author of the reservation is bound to give effect to the decision of that body [provided that it is acting within the limits of its competence.]

3.2.4 Plurality of bodies competent to assess the validity of reservations

When the treaty establishes a body to monitor its application, the competence of that body neither excludes nor affects in any other way the competence of other contracting States or other contracting international organizations to assess the validity of reservations to a treaty formulated by a State or an international organization, nor that of such dispute settlement bodies as may be competent to interpret or apply the treaty.

3.3. Consequences of the non-validity of a reservation

A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity.

3.3.1 Non-validity of reservations and responsibility

The formulation of an invalid reservation produces its effects within the framework of the law of treaties. It shall not, in itself, engage the responsibility of the State or international organization which has formulated it.

3.3.2 Nullity of invalid reservations

A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.

3.3.3 Effect of unilateral acceptance of an invalid reservation

Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

3.3.4 Effect of collective acceptance of an invalid reservation

A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and its purpose, may be formulated by a State or an international organization if none of the other contracting parties object to it after having been expressly consulted by the depositary.

During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and where appropriate, the competent organ of the international organization concerned, to the nature of the legal problems raised by the reservation.